

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 571,
Complainant,

and

IOWA WESTERN COMMUNITY COLLEGE,
Respondent.

CASE NO. 4332

PERB OCT 31 PM 2:20
PUBLIC EMPLOYMENT
RELATIONS BOARD

DECISION ON APPEAL

This matter is before us on Complainant's appeal from a proposed decision and order issued by an administrative law judge (ALJ) of the Public Employment Relations Board (PERB) on April 26, 1991. In that decision the ALJ concluded that Complainant had failed to establish any violation of the Public Employment Relations Act by the Respondent, and proposed the dismissal of the complaint.

On this appeal pursuant to PERB rules, 621 Iowa Admin. Code ch. 9, Complainant alleges that the facts found by the ALJ do not support the proposed decision and that the proposed decision is not supported by a preponderance of the competent evidence on the record considered as a whole.

Pursuant to PERB subrule 9.2(3), we have heard the case upon the record submitted before the ALJ. Oral arguments to the board were heard on July 10, 1991, at which both parties were represented: Neil A. Barrick for the Complainant and Harvey F. Wiltsey for the Respondent. Complainant filed a brief in support of its position on appeal, which also incorporated its brief to the

ALJ, and Respondent has adopted its brief to the ALJ as its brief on appeal.

Pursuant to Iowa Code §17A.15(3), on this review we possess all powers which we would have had had we elected, pursuant to PERB rule 2.1, to preside at the evidentiary hearing in the place of the ALJ.

Based upon our review of the record before the ALJ, as well as our consideration of the parties' briefs and oral arguments, we make the following findings of fact and conclusions of law.

FINDINGS OF FACT

During oral arguments to the board, Complainant's counsel questioned the existence of evidentiary support for a number of factual findings made by the ALJ. We have reviewed all of the questioned findings and believe that two deserve specific comment.

The ALJ found that "[i]n June, 1990, Porter began seriously considering the contracting of custodial services with a private contractor."¹ Our examination of the record has not revealed evidence which establishes that this serious consideration in fact began during the month of June, although the record does establish that such consideration began sometime during the summer of 1990, prior to the filing of Complainant's combined bargaining unit determination/representative certification petition. Consequently, we decline to adopt the above-quoted finding of the ALJ as our own, and instead find that:

¹Proposed decision and order at p. 8.

During the summer of 1990, prior to the filing of IUOE's petition, Porter began seriously considering the contracting of custodial services with a private provider.

Complainant also questioned the existence of evidentiary support for the ALJ's finding that "[o]n August 4, 1990, IUOE had a second meeting which included custodial employees."² Read in context, we think it is clear that this was a finding that it was not until IUOE's second meeting with interested employees, on August 4, 1990, that custodial employees were present. However, since the precise language employed by the ALJ might be read as indicating that the August 4, 1990 meeting was the second one which included custodial employees, we decline to adopt this finding as our own, and instead find that:

On August 4, 1990, IUOE had a second meeting with IWCC employees to discuss their possible organization, at which IWCC custodians, who had not participated in the initial meeting, were also present.

The remainder of the ALJ's findings of fact, as set forth in his proposed decision and order, are supported by the record. With the exception of the two substitutions noted above, we hereby adopt the ALJ's factual findings as our own and they are, by this reference, incorporated herein and made a part hereof as though fully set forth.

CONCLUSIONS OF LAW

The ALJ's conclusions of law, as set forth in his proposed decision and order, are correct and their validity is unaffected by our previous substitution of two slightly different factual

²Proposed decision and order at p. 9.

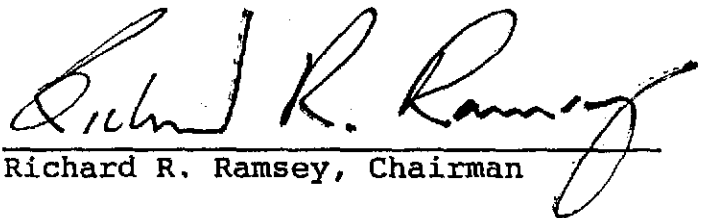
findings. We hereby adopt the ALJ's conclusions of law as our own and they are, by this reference, incorporated herein and made a part hereof as though fully set forth.

In view of this adoption of the ALJ's conclusions of law, and our adoption of his findings of fact with only minor modification, we necessarily concur in and affirm the ALJ's conclusion that Complainant has failed to establish Respondent's violation of Iowa Code §§20.10(2)(a), (c) or (d), as alleged in the complaint.

IT IS THEREFORE ORDERED that the complaint filed herein by the International Union of Operating Engineers, Local 571, be and is hereby DISMISSED.

DATED at Des Moines, Iowa this 31st day of October, 1991.

PUBLIC EMPLOYMENT RELATIONS BOARD


Richard R. Ramsey, Chairman


M. Sue Warner, Board Member


Dave Knock, Board Member

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 571,

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RESPONDENT

CASE NO. 4332

PROPOSED DECISION AND ORDER

Charles E. Boldt, Administrative Law Judge. On November 15, 1990, the International Union of Operating Engineers, Local 571 [IUOE or Union] filed a prohibited practice complaint pursuant to Section 20.11 of the IOWA CODE (1989)¹ with the Public Employment Relations Board [PERB or Board]. The complaint alleges that the Iowa Western Community College [IWCC or College] violated Sections 20.10.(2)(a), (c) and (d) of the Public Employment Relations Act, Chapter 20, IOWA CODE [Act] by terminating certain employees and contracting with a private employer the work performed by these employees [custodial work] for the purpose and intent of interfering with the organizing activity and the rights guaranteed public employees pursuant to the Act during the pendency of a combined petition for unit determination and representative certification for maintenance and custodial employees of IWCC. The

¹All references to the Iowa Code will be to the 1989 Code unless otherwise specified.

Union's complaint requests reinstatement with full back pay and benefits and the right to vote in the representative certification election in the petitioned for unit.

IWCC filed its answer to the instant complaint on December 26, 1990 in which the college denies each and every allegation in the complaint. IWCC also requested dismissal of the complaint for failure to state a cause of action pursuant to the Act. This Motion to Dismiss was subsequently withdrawn at hearing and will not be addressed further.

A hearing was conducted before me at Council Bluffs, Iowa on February 11, 1991, where IUOE was represented by Neil A. Barrick and IWCC was represented by Harvey F. Wiltsey and Robert J. Laubenthal. Both parties had full opportunity to present testimony and evidence at hearing and both parties filed post-hearing briefs by April 1, 1991. Based on the entire record in this case, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

At hearing, the parties stipulated that IWCC is a public employer pursuant to the Act and IUOE is an employee organization pursuant to the Act. Neither party objected to PERB's jurisdiction to hear the matter.

IWCC is one of Iowa's 15 area community colleges with its main campus located in Council Bluffs, Iowa. Heretofore only one group of IWCC's employees, the faculty, have been certified before PERB for purposes of collective bargaining. On September 10, 1990, IUOE

filed a petition with PERB seeking representation of the following described unit:

INCLUDED: All custodians, boiler engineers, maintenance engineers, outside grounds keepers, painters, and all maintenance employees of the above employer at their facility at 2700 College Road, Council Bluffs, Iowa, 51503.

EXCLUDED: Supervisors, guards, professionals, and any and all statutory exclusions.²

On November 11, 1990, IWCC entered into a contract with the Marsden Building Maintenance Company³ for the performance of custodial work at IWCC's Council Bluffs campus. On November 14, 1990, IWCC gave notice of immediate termination to 14 custodial employees employed at the Council Bluffs campus and paid each terminated employee two weeks severance pay. This action by IWCC prompted the instant prohibited practice complaint.

The chronology of events germane to this case start with the hiring of Donald L. Porter [Porter] as Vice-President of Management Services for IWCC in December, 1988. In this capacity, Porter was given responsibility to administer IWCC's Board policies in the areas of budget and finance, maintenance and operations, computer operations, auxiliary enterprise operations, dormitory, bookstore, food service, and general management. Porter soon became aware of cash flow and budgetary problems within IWCC's financial structure.

²Union Exhibit 1.

³Joint Exhibit 2.

The first area of concern was IWCC's food service. Porter noted that the food service area had accumulated a \$140,000 loss over the preceding three year period. Determination was made that the food service enterprise would have to be modified to generate, minimally, a break even profitability status. Toward this end, Porter contacted Warren D. Hunt [Hunt] of Wichita, Kansas, in January, 1989. Hunt was then, and is now, president of a contract food service and management consultant firm, Great Western Campus Dining.

In February and March, 1989, Hunt visited the IWCC campus twice to discuss problems and concerns IWCC had and set a time for Hunt to revisit the campus for a prolonged visit to study operations when they were fully active. During these preliminary meetings, Hunt discussed the potential for contracting out services and/or the management of the food service, custodial, maintenance, security, and bookstore areas of the College. The employment areas of administration, faculty, and clerical were not considered for contracting out.

Hunt visited IWCC for a week in April, 1989, and made recommendations regarding the restructuring of food service, contracting out security and custodial services, and contracting out management of the bookstore. Among the recommendations made by Hunt was a projected 15% to 30% savings if IWCC were to contract out custodial services.

IWCC began implementing changes in the food service area at the end of the spring semester. Included in these changes were

implementation of a full cash transaction basis, elimination of discounted meals, elimination of all full-time food service positions except those of the administrator and the assistant director, and menu control. All of these control mechanisms were enacted prior to the commencement of the new fiscal year.⁴

By the end of FY'89, collective bargaining for the faculty contract, which was to begin July 1, 1989, was not complete. In August, 1989, IWCC entered the fact-finding stage of impasse in these negotiations. Porter prepared an exhibit for that fact-finding titled "Significant Financial Concerns".⁵ This exhibit was intended to support the College's argument of inability to finance the faculty union's requested economic package. This document identifies a loss in FY'89 from IWCC's Unrestricted General Fund of \$274,937. This document also argued that there was no room for operational loss in FY'90. The fact-finder's recommendation failed to resolve the impasse between IWCC and the faculty union and the dispute proceeded to arbitration.

In December, 1989, the arbitrator's award for the faculty contract was issued providing a settlement retroactive to July 1, 1989. IWCC implemented the award, not only for faculty, but for the other employees of IWCC as well, including retroactivity.

With costs for the first half of FY'90 known, IWCC felt compelled to initiate an austerity program to attempt to balance

⁴References to fiscal years for IWCC will be designated as FY and the last two digits of the calendar year in which the fiscal year ends. IWCC's fiscal year is July 1 through June 30.

⁵Employer Exhibit 1.

the FY'90 budget. In a document titled "FY90 Budget Control Adjustments", IWCC sought to curtail spending on out-of-state travel, in-state travel, elimination of new construction or renovation projects, no replacement of attritted staff, reduced purchases of materials, supplies and capital equipment, no new purchased services, leases or rentals, and reduced thermostat controls on a campus-wide basis. This austerity program came into effect in January, 1990.

On February 19, 1990, two communications were generated. One was a memo to Porter from the Director of Student Housing detailing bids and services offered by two security firms for provision of security services at IWCC. The second page of this memo sets forth current costs for security services provided internally. The difference between the low bidder and the current cost would reflect approximately \$15,000 in savings by contracting the service.

The other communication generated February 19, 1990 is titled "Administrative Recommendations FY91 Budget Control Adjustments and Staff Restructuring".⁶ Porter had estimated a requisite cost reduction of \$500,000 if IWCC was to keep FY'90 and FY'91 with a positive economic balance. This document was given first to IWCC's Board, then to the public. It sets forth 13 areas of recommended action and the estimated savings, if known, for the implementation of the recommended action. The recommendations include: (1) Elimination of the IWCC Foundation staff positions; (2) Elimination

⁶Employer Exhibit 5.

of Director of Personnel/Purchasing position (the bulk of these duties were assumed by Porter); (3) Eliminate the Director of the Physical Plant position; (4) Eliminate subsidy by IWCC to radio station KIWR and require same to be self-sustaining; (5) Combine the positions of Director of Clarinda campus and Director of Shenandoah campus; (6) Eliminate three part-time Student Services positions; (7) No replacement for the vacant position of Director of Adult Basic Education; (8) Redefine the Director of Health Occupations position; (9) Eliminate the Director of Business Occupations position; (10) Eliminate the FAME/CO-OP coordinator position; (11) Redefine all Academic Coordinator positions; (12) Reduce part-time and overload costs by evaluating all class size limitations; and, (13) Reduce faculty positions where possible. Items one through ten had cumulative estimated savings of \$478,461.70. It was believed that what savings might accrue from the implementation of recommendations 11 through 13 would push this figure to the targeted \$500,000 mark. The implementation of these recommendations was for FY'91, but the announcements were made in late February or early March, 1990.

IWCC experienced the layoff of approximately 14 employees from the administration and contracted security services with a private company and laid off IWCC's security personnel in Spring, 1990. The meetings of IWCC's Board to make these decisions were held in closed session. None of the affected employees were apprised of pending layoffs until the decisions were made and announced. In the case of the security personnel, the day of announcement was the

day of their termination. Keys and uniforms were collected. They were paid two weeks severance pay. In the case of administrative layoffs, some employees were covered by contracts under Chapter 279, IOWA CODE and generated some termination hearings pursuant to that chapter.

This seemingly precipitate action by IWCC caused consternation in other IWCC staff anticipating further reduction in personnel. Porter decided to do some damage control and met with different employee groups, including the custodians. His message was basically that IWCC had implemented the staff reductions necessary for IWCC to achieve their desired economic stability. These meetings transpired in April or May, 1990.

In June, 1990, Porter began seriously considering the contracting of custodial services with a private contractor. This consideration was an extension of discussions at the cabinet and staff levels concerning how the faculty contract increases could be funded.

In July, 1990, several actions occurred. Effective July 1, 1990, IWCC instituted raises for all staff at IWCC, including custodians. It was also during July, 1990 that the Director of Custodial Services, "Bud" Hauger [Hauger] announced his pending retirement in November, 1990. In July, 1990, the maintenance employees made their initial contact with IUOE to inquire about possible representation for the purposes of collective bargaining.

In late July, 1990, IUOE met with the maintenance employees. At this initial meeting the maintenance employees suggested that

the custodial employees might also desire representation for collective bargaining with IWCC. On August 4, 1990, IUOE had a second meeting which included custodial employees. Representation authorization cards were signed at this meeting and others were collected following the meeting. Rumors of this organizing activity circulated at IWCC.

It was also during August, 1990 that Porter was determining which custodial contractors should be contacted as potential purveyors of custodial services to the College. Four companies were invited to tour the campus and meet with the administration. Discussions and tours occurred in late August and early September, 1990. The four companies were invited to tender bids for providing custodial services to IWCC.

On September 10, 1990, IUOE petitioned PERB for unit determination (UD) and representative certification (RC).⁷ On September 17, 1990, Neil A. Barrick [Barrick], attorney for IUOE, sent Porter a letter⁸ soliciting a stipulation of bargaining unit pursuant to the petition. On September 20, 1990, PERB sent Porter a cover letter from Board Chairman Richard Ramsey and Notices to Employees that a petition had been filed. Porter contacted IWCC's legal counsel to ascertain the ramifications of the petition in

⁷The original petition shows the UD and RM boxes checked. The petition was subsequently corrected to reflect a combined UD/RC petition. Official notice of this fact is taken pursuant to Section 17A.14(4), IOWA CODE and is within the specialized knowledge of the Agency. Since this fact is for clarity of the nature of the petition only, fairness to the parties does not require an opportunity to contest this fact.

⁸Union Exhibit 15.

light of the plan to contract custodial services. Porter was advised to proceed.

Also in September, 1990, Hauger informed custodial employees that the company which provided the custodial uniforms would be coming to measure employees for their new uniforms. IWCC's contract with the uniform provider allowed for periodic replacement of worn out uniforms.

In October, 1990, three of the four companies invited to submit bids for the provision of custodial services did so. On October 16, 1990, the Marsden Building Maintenance Company [Marsden] submitted a bid proposal⁹ with an annual cost of \$263,400. This was the low bid. On October 18, 1990, the Midwest Maintenance Company, Inc. [Midwest] submitted a bid proposal¹⁰ with an annual cost of \$301,221.12. This was the high bid. On October 27, 1990, the Servicemaster Company [Servicemaster] submitted a bid proposal¹¹ with an annual cost of \$288,522. While this was the middle bid, it is further distinguished from the other two in that it did not provide for cleaning of the radio station, KIWR, and it required bi-weekly payments in lieu of monthly payments.

There is an inconsistency in the record which this Administrative Law Judge cannot resolve. The IWCC Board met in a special meeting on November 12, 1990 and approved the termination of their custodial staff and the contracting of custodial services

⁹Union Exhibit 12.

¹⁰Union Exhibit 14.

¹¹Union Exhibit 13.

with Marsden.¹² The contract with Marsden¹³ has an effective date of November 11, 1990. It is not possible to determine from the record whether the contract with Marsden was executed before IWCC's Board approved it or whether the effective date of the contract was pre-dated at its actual execution. At this November 12, 1990 special meeting, the IWCC Board was presented a document prepared by Porter titled "Potential for Saving-Use of Contracted Custodial Services."¹⁴ This document sets forth current cost projections totaling \$330,675.44 for custodial services and supplies. It also sets forth the bids of the three companies competing for the custodial contract with potential cost savings. It concludes with a recommendation to terminate the necessary employees and contract with Marsden for an annual savings of \$67,275. The report of the business of this special board meeting indicates that, after receipt of Porter's information and discussion, the Board approved the administrative recommendation.

On November 14, 1990, 14 custodial employees received notification of termination.¹⁵ This notice cites as reason for the termination: (1) elimination of position; (2) reduction in workforce; (3) budgetary constraints; (4) establishment of contract with third party for all campus custodial services. Similar to the layoff of the security employees when security services were

¹²Union Exhibit 16.

¹³Joint Exhibit 2.

¹⁴Joint Exhibit 1.

¹⁵Union Exhibit 3.

contracted out, the College gave no advance warning of pending layoff and termination was effective on the same day as notice. Affected employees were given two weeks severance pay. Porter issued a memo to all IWCC employees regarding the change in custodial services.¹⁶ There was also a notice that Marsden would accept applications from terminated employees.¹⁷ On November 14, 1990, representatives of the terminated custodial employees contacted IUOE to complain about their treatment.

It must be noted that from the initiation of organization of maintenance and custodial employees by IUOE in July, 1990 through November 14, 1990, IWCC did not wage a campaign against unionization nor did any representatives of IWCC evince anti-union animus. At no time was it suggested that the contracting of custodial services could be forestalled if the employees abandoned their organizing effort. In fact, custodial employees were kept deliberately unaware of the plans to contract custodial services with a private company. Presumably, even "Bud" Hauger was unaware of these plans.

On November 15, 1990, IUOE filed the instant prohibited practice complaint with PERB.

On November 19, 1990, IWCC was served with the complaint. Also on November 19, IWCC's Board reaffirmed their decision to terminate the 14 custodial employees. At this regular board

¹⁶Union Exhibit 4.

¹⁷Union Exhibit 5.

meeting, the IWCC board also accepted the retirement of another custodian and that of Hauger, Head Custodian.

At hearing, IUOE stressed that the Marsden contract only reflects the custodial work that the terminated IWCC custodians did, but the contract does not address non-custodial work they performed; specifically, "set ups". A set-up is the arrangement for a room to the specifications of the requesting party. IWCC staff as well as parties renting meeting rooms would generate this set-up work. Testimony indicated a considerable quantity of the custodial workforce duty time was spent doing these set-ups. While the Marsden contract with IWCC does not address set-ups, uncontroverted testimony indicates that the Marsden employees are indeed performing set-ups and the work performed by Marsden is approximately equivalent to that which was performed by IWCC employees. IWCC does have to provide Marsden with advance notice of set-ups so that cleaning requirements can be adjusted. There was no evidence that having Marsden perform the set-up duties have generated costs greater than those submitted in their bid. It is sufficient to say that, at the time of hearing, Marsden was providing to IWCC a level of custodial services which was acceptable to IWCC at the contracted monthly cost. If this arrangement changes to a level where IWCC is dissatisfied with Marsden, the contract has a 30 day escape clause whereby either party may sever the contractual relationship upon 30 days advance notice.

CONCLUSIONS OF LAW

The issue in this matter is whether Iowa Western Community College committed a prohibited practice under Section 20.10(2)(a), (c) and (d) of the Act when it discharged custodial employees during the pendency of a combined petition for unit determination and representative certification for these and other employees of the College.

Section 20.10 of the Act states, in relevant part:

2. It shall be a prohibited practice for a public employer or the employer's designated representative willfully to:

a. Interfere with, restrain or coerce public employees in the exercise of rights granted by this chapter.

* * *

c. Encourage or discourage membership in any employee organization, committee or association by discriminating in hiring, tenure, or other terms or conditions of employment.

d. Discharge or discriminate against a public employee because the employee has filed an affidavit, petition or complaint or given any information or testimony under this chapter, or because the employee has formed, joined or chosen to be represented by any employee organization.

Public employee rights are set forth in Section 20.8 of the Act:

Public employees shall have the right to:

1. Organize, or form, join, or assist any employee organization.

2. Negotiate collectively through representatives of their own choosing.

3. Engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection insofar as any such activity is not prohibited by this chapter or any other law of the state.

4. Refuse to join or participate in the activities of employee organizations, including the payment of any dues, fees or assessments or service fees of any type.

IUOE argues that IWCC's actions were taken in order to avoid dealing with IUOE for the particular employees involved and that IWCC's contention that its actions were taken for a legitimate business purpose is pretextual. Citing Wright Line,¹⁸ IUOE also alleges dual motives, legal and illegal.

In support of IUOE's contention that IWCC was motivated to terminate the custodians because of protected activity, IUOE argues that IWCC commenced and took the adverse action after the filing of the petition. IUOE asserts that in early 1990, the custodians were informed that their jobs were secure. They further argue that bids were not solicited until after the filing of the petition and that IWCC improperly assessed the costs involved relative to IWCC custodians compared to the bids submitted by the independent contractors of custodial services.

In its brief, IUOE seeks to impeach the testimony of Don Porter. IUOE first argues that Porter was not specific as to when the contracting of custodial services was initiated because to admit that it was initiated after the filing of the petition would

¹⁸Wright Line, A Division of Wright line, Inc., 251 NLRB 1053 (1980), enf'd., 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982).

be tantamount to an admission that the petition, the protected activity, was the motivating factor in the adverse action. Circumstances supportive of the contention that IWCC did not seriously consider contracting custodial services until after the petition was filed include the pay raise received by custodians effective July 1, 1990 and the two weeks severance pay given the terminated custodians. IUOE suggests that the former is indicative that IWCC did not have thoughts of contracting custodial services and the latter was an attempt to "gloss over the improper motives behind the action that they took." Further, IUOE contends that, since employees were told that additional layoffs were not considered necessary following the contracting of security services and administrative layoffs and that custodians would be measured for new uniforms, these circumstances demonstrate that IWCC did not seriously contemplate contracting custodial services until after the filing of the petition.

IUOE argues that, with no supporting documentation to substantiate Porter's testimony about contacting the custodial contractors and activities preceding the actual receipt of the bids, nor corroborative testimony, Porter's testimony is not credible.

In support of IUOE's allegation that the legitimate business purpose put forth by IWCC was pretextual, IUOE points to the non-custodial duties which were performed by IWCC's custodians and the absence of mention of these duties in the Marsden contract with IWCC. Specifically, IUOE references the "set-ups" previously

discussed. IUOE's figures purport that IWCC compared "apples to oranges", i.e., cost of custodial services (contractor) to cost of custodial and non-custodial services (IWCC's custodians). IUOE contends that due to faulty analysis of costs, there has been a diminution of services and, therefore, no legitimate business purpose to the contracting of custodial services.

IUOE also argues that anti-union animus is demonstrated by the testimony from Terry Bogs [Bogs] that Marsden failed to hire Bogs after telling Bogs that they would have to check with IWCC before hiring him. IUOE points out that Bogs' testimony was uncontroverted and should be dispositive in showing that IWCC did not want individuals that might have been involved with the organizing activity to return to IWCC with Marsden. Additionally, Porter's testimony is called into question since he testified that contacting IWCC about prospective Marsden employees who were former IWCC employees was not a condition between Marsden and IWCC. IUOE argues that this testimony of Bogs, in and of itself, is sufficient to establish a prima facie showing of animus by IWCC.

IWCC argues that it has rebutted IUOE's attempt to make a prima facie showing of anti-union animus. IWCC's projected savings of at least \$67,000 per annum establishes a valid business reason for contracting custodial services to Marsden according to IWCC. IWCC contrasts the instant case with Marshall County,¹⁹ in that the financial data upon which the decision to contract custodial services was made was definitely generated before the decision was

¹⁹Marshall County, 86 PERB 3058 & 3085.

made. IWCC also argues that, unlike Marshall County, there have been no anti-union activities or statements.

IWCC indicates that its economic motivation is clear in that the College was experiencing financial difficulties in 1989. Hunt's early prediction of 15% to 30% savings was an inducement for IWCC to seriously consider contracting custodial services. IWCC argues that Porter told Hunt in Spring, 1990, that he was ready to move toward contracted custodial services and this is supported by Porter's testimony that he was seriously considering how to proceed with contracting custodial services in June, 1990, before IUOE was contacted and organizing meetings were held and before the petition was filed. IWCC suggests that it is possible that the custodial employees suspected the move toward contracted custodial services and initiated organizing activities in response to it.

IWCC states that the actions taken by the IWCC Board regarding the contracting of custodial services were consistent with other cost saving actions taken previously when they contracted security services and eliminated administrative positions.

Pertinent to the timing involved in the instant case, IWCC argues that all contemplated cost saving measures could not be implemented at once. This situation was compounded by the elimination of two administrative positions which would have been actively involved in the process.

IWCC maintains that Marsden is providing equivalent custodial and non-custodial services at a lower cost. IWCC further asserts that whether the contracting of custodial services was a good

business decision or a bad business decision is not relevant, but only if business reasons were the motivating factor in the decision making process.

Wright Line establishes a two pronged test in cases alleging dual motives. It is set forth thus:

First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.²⁰

In the first phase of the Wright Line analysis, IUOE relies heavily on the timing of the petition vis-a-vis the timing of the submitted bids by the contractors. Clearly the petition preceded the bidding. At odds with this physical evidence is the testimony of Porter that deliberations on the contracting of custodial services preceded the petition. The credibility of Porter's testimony is critical in the establishment of the requisite prima facie showing that protected conduct was a motivating factor in IWCC's actions.

IUOE did not attack Porter's credibility at hearing. In its post-hearing brief IWCC brought its arguments questioning Porter's credibility; to wit, if IWCC was contemplating the contracting of custodial services, the custodial employees would not have been told about being measured for uniforms; if IWCC was in such dire

²⁰Wright Line, Supra at 1175.

financial straits, it would have acted sooner; Porter could not be specific about when contracting of custodial services activities started so they must have started later than generally indicated by Porter; pay raises given the custodians in July, 1990 would only have been given if IWCC had no thoughts of contracting custodial services and the severance pay was a cover for illegal motivation; Porter's assurances to custodians in early 1990, is evidence that IWCC had no intention of contracting custodial services; and, Porter's testimony about early contracts with the custodial contractors was not corroborated by documentation or testimony by any of the contractors or by testimony of a clerical who might have made the contacts. IUOE also suggests that Porter's credibility is questionable regarding the refusal to Marsden to hire Bogs and IWCC's role in that refusal. Contrary to Porter's assertion that there was no condition of contract between Marsden and IWCC that IWCC should be contacted and approval received before Marsden could hire former IWCC custodians, IWCC blocked Bogs hiring to prevent a possible union activist from returning to the IWCC campus. Each of these areas, individually and in concert, merit consideration in the determination of Porter's credibility.

IUOE's first contention deals with the custodians being told they would be measured for new uniforms. This communication came from Hauger. There is nothing in the record to indicate that Hauger was a participant in the decision making process to contract custodial services or was aware of the deliberations in this regard. His communication was consistent with his knowledge, which

was incomplete. I cannot conclude that Hauger's communication about uniforms was deliberately misleading or indicative of the thinking of upper echelon IWCC administrators.

IUOE's next contention deals with the delay in contracting the custodial services under conditions of financial stress. There is no question that IWCC has been in a protracted period of economic convulsion. There is also ample evidence that IWCC opted to address its economic concerns sequentially. The first area addressed was the area of greatest economic loss, food service. Second, IWCC enacted the contracting of security services and broad based administrative cuts. The next area, the one at issue here, was the contracting of custodial services. Porter testified that delay in this area was engendered by his augmented personnel duties and the time consuming hearings under Chapter 279, IOWA CODE following the cuts in administration. I conclude that Porter's explanation of the delay is plausible.

Regarding the commencement of deliberations on contracting custodial services, IUOE contends that Porter's lack of specificity is cause to bring his testimony under suspicion. This area of testimony was, at least in part, corroborated by Hunt.²¹ Porter had indicated to Hunt in the Spring of 1990, that he was ready to move forward in contracting custodial services. Porter's testimony indicates that serious deliberation began in June, 1990, and initial contacts with potential custodial service providers occurred in August, 1990. It is also clear from Porter's and

²¹Transcript at 166.

Hunt's testimony that discussions of the potential of contracting custodial services started in early 1989. I conclude that the testimony of Porter and Hunt is credible and that deliberation on contracting custodial services predated IUOE's organizing activities with the custodians.

IUOE's argument that pay raises would not have been granted to the custodians in July, 1990 if contracting of their services was under consideration at the time, is not supported by the record. Nor is the contention that the payment of severance pay was a cover for improper motivation. Porter's uncontroverted testimony of IWCC's practice of granting raises to non-contractual employees commensurate with negotiated raises for the faculty is persuasive. The payment of severance pay to the custodians was identical to the payment of severance pay to security under similar circumstances.

Porter's meeting with the custodians in early 1990, following the contracting of security services and cuts in administration is characterized by IUOE as proof that IWCC was not contemplating the contracting of custodial services. Porter characterized this meeting as "damage control". This event must be considered in context with the secrecy that enshrouded prior cost saving decision making; specifically the contracting of security services. I conclude that IWCC and Porter would have, and did, conceal the deliberative process leading to the contracting of custodial services. Additionally, this event sufficiently preceded the activities leading to the contracting of custodial services that it cannot stand as proof against later events.

The lack of corroborative testimony or physical evidence about the initial contacts with the potential custodial service providers does not impeach Porter's testimony in this regard. IUOE has the burden of proof in making its prima facie showing of improper motive. IUOE had equal opportunity to present testimony and evidence to refute Porter's testimony. It failed to do so.

Bogs testified that he was told by a representative of Marsden that he could not be hired by Marsden until IWCC had been checked with. IUOE points out that this testimony was uncontroverted. While ostensibly another employee went with Bogs to apply at Marsden, this testimony was also not corroborated. Bogs testimony is credible, but is not persuasive. There is nothing in the record to demonstrate that Marsden ever contacted IWCC concerning the prospective hiring of Bogs nor does the record disclose the reason(s) why Bogs was not hired by Marsden. Porter testified that there was no agreement between IWCC and Marsden regarding employment of former IWCC custodians. He testified that interference with prospective employment opportunities would be self-defeating for IWCC since the College was paying unemployment compensation to the custodians laid off and employment would mitigate that financial liability.

IUOE intimates that IWCC would want to prevent re-employment on the IWCC campus of people possibly involved in union organizing activity. The record is devoid of support for this contention.

In reviewing all the circumstances that IUOE has advanced to challenge Porter's testimony, I find IUOE's contentions are highly speculative and insufficient, when taken individually or as a whole, to impeach his testimony. I conclude that Porter's testimony is wholly credible.

IUOE advances the proposition that evidence and testimony presented through Donald Schaller [Schaller], Certified Public Accountant, is the only true reflection of the costs involved with contracting custodial services. While IUOE does not expressly state that the IWCC decision makers deliberately misconstrued costs in order to thwart protected activities, it implies this with the contention that the business reasons advanced by IWCC as the motive for its decision to contract custodial services were pretextual. The document prepared by Schaller was prepared well after the decision making and decision implementation by IWCC. IWCC admits it made no distinction between custodial work and non-custodial work. In fact, IWCC considered all work performed by custodians as custodial work. IWCC analyzed the costs based on its own figures. That two capable professionals can analyze a situation differently is common. Schaller's separate and distinct analysis is not demonstrative of anti-union animus.

Based on the foregoing and in the absence of any anti-union activity or commentary, I conclude that IUOE has failed to make a prima facie showing sufficient to support the inference that the organizing activity among IWCC's custodians was a motivating factor in IWCC's decision to terminate those custodians and contract the

work with Marsden. In accordance with this conclusion, I further conclude that IWCC did not commit a prohibited practice pursuant to Sections 20.10(2)(a), (c) or (d) of the Act.

Accordingly, I hereby issue the following recommended:

ORDER

The complaint filed by the International Union of Operating Engineers, Local 571, is dismissed in its entirety.

DATED at Des Moines, Iowa this 26th day of April, 1991.

PUBLIC EMPLOYMENT RELATIONS BOARD

Charles E. Boldt

CHARLES E. BOLDT
ADMINISTRATIVE LAW JUDGE